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Shainis & Peltzman, Chartered

Counselors at Law

Suite 240
1850 M Street, N.W.
Washington, D.C. 20036

(202) 293-0011

Fax (202) 293-0810

e-mail: shainispeltzman@s-plaw.com

Aaron R. Shainis
aaron@s-plaw.com

Lee J. Peltzman
lee@s-plaw.com

Of Counsel

William H. BuRoss, III
bill@s-plaw.com

Robert J. Keller
bkeller@s-plaw.com

May 14, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

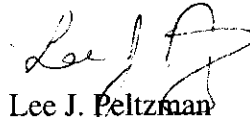
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MM Docket No. 95-31
Comments of Jack Gartner

Dear Mr. Caton:

Transmitted herewith, on behalf of Jack Gartner, is an original and four (4) copies of his Comments in the above-referenced rulemaking proceeding. Please contact the undersigned in the event the Commission has any questions with respect to these Comments.

Sincerely,



Lee J. Peltzman
Counsel for
JACK GARTNER

Enclosure

cc: Wanda Hardy, on diskette

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of

Reexamination of the Comparative Standards for
Noncommercial Educational Applications

Association of America's Public Television
Stations' Motion for Stay of Low Power
Television Auction (No. 81)

To: The Commission

MM Docket No. 95-31

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**FEDERAL COMMUNICATIONS COMMISSION
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COMMENTS

Jack Gartner ("Gartner"), by his attorneys, hereby submits his Comments in response to the Commission's Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 3833 (2002), in which the Commission proposed an approach to resolve mutually exclusive broadcast applications involving both commercial and noncommercial educational ("NCE") entities. This rulemaking is the consequence of the decision last year in National Public Radio v. FCC, 254 F.3d 266 (D.C.Cir. 2001), in which the Court held that the Commission may not utilize competitive bidding in those cases involving NCE applicants, even when they are mutually exclusive with commercial applicants who are subject to the bidding process.

Gartner is an applicant for a construction permit for a new television station on Channel 30 at Davenport, Iowa. His application remains pending and is mutually exclusive with applications filed by NCE entities. Thus, he is directly impacted by the outcome of this rulemaking. Gartner supports the proposals made by the Commission, with slight modifications

discussed herein, regarding the procedures the Commission should utilize to license “non-reserved” channels when both commercial and NCE entities have expressed an interest.

Discussion

The Commission offers three basic mechanisms to resolve the competing interests of commercial and NCE entities for non-reserved spectrum. These options include the following: (1) holding NCE entities ineligible for licenses for nonreserved channels and frequencies; (2) permitting NCE entities opportunities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities; and (3) providing NCE entities opportunities to reserve additional channels in the Table of Allotments. When utilized in tandem, Gartner believes that these options would expand opportunities for NCE applicants without being unfair to commercial entities who have an interest in the same non-reserved spectrum.

Gartner supports the first two options discussed by the Commission which would hold NCE entities ineligible to apply for licenses for non-reserved channels except where only NCE entities have filed singleton or mutually exclusive applications. In the latter case, the Commission could resolve the conflict between NCE applicants through its current noncommercial point system. If both commercial and NCE entities filed applications for channels creating a technical conflict, the Commission, absent settlement by the parties, would simply dismiss the applications of the NCE entities. This option would be simple to administer and would not be unfair to NCE entities since they have their own reserved spectrum available in the areas they desire to serve.

In those cases where both commercial and NCE entities filed mutually exclusive applications the Commission should revise its anti-collusion rules to permit competing applicants

to pursue settlement. This would involve both engineering solutions and other types of settlements including those that are financial in nature. There is no reason to think that applicants will take advantage of the Commission's rules by filing applications in order to reach settlements since no commercial entity would be aware that a NCE entity had filed a mutually exclusive application until after the filing window was complete. In the event no NCE entity filed a mutually exclusive application, those commercial entity proposals would proceed directly to an auction as is currently provided for in the Commission's rules and policies. Such a remedy would be entirely consistent with Section 309(j)(1) of the Communications Act, which expressly instructs the Commission to resolve mutually exclusive licenses through competitive bidding subject to a caveat in Section 309(j)(6)(E), which section states: "Nothing ... in the use of competitive bidding shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations ... and other means in order to avoid mutual exclusivity in application and licensing proceedings." In fact, to forbid such settlements would violate the specific language contained in the Act regarding "engineering solutions [and] negotiations" in order to avoid mutual exclusivity.

Gartner has no objection to the Commission third option, which would continue to provide opportunities to reserve additional FM and TV channels for noncommercial educational use through relaxed reservation criteria. However, Gartner would support such a proposal only if a proponent for reservation could demonstrate, first, in the case of radio, that the proponent was technically precluded from using a reserved channel, or, in the case of TV, that no reserved channel was available in the proponent's community, and, second, that the proponent would provide a first or second radio or TV noncommercial educational service to at least 10% of the population within its service area. These constitute the Commission's present standards for

providing opportunities to reserve additional channels for noncommercial educational use. There is no reason to expand or relax the reservation criteria at this time. Should the Commission determine after future auctions have been held that its experience shows that the criteria for reserving channels at the application stage are too severe, the Commission could at that point relax its reservation criteria.

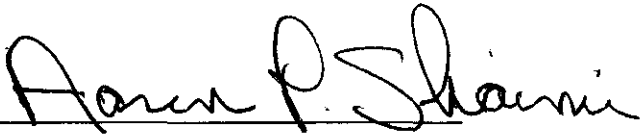
The Commission should most definitely not adopt new rules for reserving already allotted channels that have not yet been auctioned. The administrative burden in proposing and administering rules to determine whether any of 500 or more vacant FM allotments should be reserved under new criteria would constitute a nightmare of overwhelming proportions. The Commission simply lacks the staff manpower to review as many as 500 rulemaking decisions which are now final. Moreover, the Commission has already delayed its radio auction for well over one year. By necessity, it will have to continue to delay that auction until a Report and Order is issued in this proceeding. To delay such an auction for some additional indefinite amount of time, while the Commission decided among 500 or more rulemaking cases, would constitute a catastrophe. The greater good would be to apply any new rules providing for opportunities to reserve additional FM and TV channels for the future only.

Conclusion

For the reasons specified above, Gartner supports the three options proposed by the Commission in its Second Further Notice of Proposed in Rulemaking in MM Docket No. 95-31. These proposals, as applied as discussed herein, would be fair and equitable both to commercial and noncommercial educational entities. Gartner requests immediate action by the Commission on these proposals so as to provide all broadcast entities, both commercial and noncommercial educational, with an opportunity to apply for and be granted applications to provide new and expanded broadcast service to the public.

Respectfully submitted,

JACK GARTNER

By: 

Aaron P. Shainis
Lee J. Peltzman
His Attorneys

Shainis & Peltzman, Chartered
1850 M Street, NW, Suite 240
Washington, DC 20036
Tel: (202) 293-0011
Fax: (202) 293-0810

Date: May 14, 2002

CERTIFICATE OF SERVICE

I, Susan Crawford, a secretary in the law firm of Shainis & Peltzman, Chartered, sent on May 14, 2002, by U.S. First-Class Mail, postage-prepaid, copies of the foregoing COMMENTS to:

Todd D. Gray, Esq.
Dow Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036-6802

Howard Liberman, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005-1208



Susan Crawford